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International Court of Justice

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Nuremberg, July 1946

P L E A

for

Col.Gen. (retd.) Alfred J O D L .

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Mr. P r e s i d e n t ,

May it please the Tribunal!

In this unique trial, the finding out of the truth is faced by unique difficulties. At a time when the wounds of the war are still bleeding, when the excitement at the events of the last few years is still to be felt, at a time when the archives of one side are still shut, a just verdict is to be given with dispassionate neutrality. Material for the trial has been spread out before us which covers a quarter of a century of world history and events from the 4 quarters of the globe. And on the basis of this gigantic material we see 22 men being accused simultaneously. That makes it terribly difficult to keep one's eyes clear for the guilt and responsibility of each individual. For inhumanities of an almost unimaginable vastness have come to light here, and the danger exists that the deep shadow which falls on some of the defendants

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may also darken the others. Some of them, I fear, appear in a different light owing to the company in which they are here, than if they were alone on the defendants' bench.

The prosecutors have increased this danger still more by repeatedly making communal accusations, mixing legal and moral reproaches: They said that all the defendants had enriched themselves from the occupied territories, that there was not one who did not shout "die Juda", etc. No attempt to prove this in the case of each individual was made; but the statement alone already creates an inimical atmosphere to all of them.

One of the things that come under these actions by the prosecution which make the clearing up of the question of individual guilt more difficult, is the fact that the defendants Keitel and Jodl are treated as inseparable twins: one common plea against them by the British prosecutor, one common trial brief by the French prosecution. And finally the Russian prosecution spoke very little about the individual defendants, but heaped reproach after reproach upon all the defendants.

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All this is clearly intended to shorten the trial, but hardly, serves to clear up the question of the individuals responsibility.

Indeed, the Indictment goes still further: it stretches beyond these 22 defendants and affects the fate of millions. This through the prosecution of the organisations, which, taken in conjunction with law No.10, has as its result that one can be punished for the guilt of other persons. Finally, a thing that is more important at the moment is a further form of the summary treatment of the defendants. The prosecution is bringing in the conception of a "conspiracy" to reach the result again that persons can be made individually responsible for something wrong that others did. I must go into this point in greater detail, as it concerns my client too. It is actually clear, I think, from the previous speaker's statements that a conspiracy to commit crimes against the peace, the laws of war and humanity did not in fact exist, so I shall only show one thing: if such a conspiracy did actually exist, Jodl at least did not belong to it.

The prosecutor admitted that Jodl's participation in the conspiracy before 1933 could not be proved.

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And in fact, anyone whose attitude towards the whole National-Socialist movement was so mistrustful (German transcript p.10 756) and who spoke with such sceptical reserve about its seizure of Power (German transcript p.10 756, witness General v.Vermann) did did not conspire to help Hitler into the saddle.

But the prosecution seems to think that Jodl joined the alleged conspiracy in the period before 1939. In fact, during this time too nothing essential changed for him.

Actually his attitude towards Hitler was now afully loyal one, for it was Jodl's respected Field Marshal von Hindenburg, who had called Hitler to the government, and the German people confirmed this decision with over 90% of its votes. Added to this was the fact that in Jodl's eyes, and not only Jodl's, Hitler's authority was bound to rise powerfully in view of his marvellous successes at home and abroad, which now followed one another in quick succession.

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But personally Jodl remained without any connection with Hitler. He did not participate in any of the big meetings at which Hitler developed his programme. His book "Mein Kampf", the Bible of National-Socialism, he only read parts of. Jodl just remained an unpolitical man in accordance with his personal inclinations, which lay far from party politics, and in accordance with the traditions of the old family of officers from which he sprang. Inwardly of liberal leanings, he had little sympathy for National-Socialism, outwardly he was forbidden, as an officer, to belong to the party and he was forbidden all rights to vote and all political activity.

If, as the prosecution says, the party held the conspiracy together and was the "Instrument of Cohesion" between the defendants, then one asks in vain what cohesion existed between Jodl and -let us say- Sauckel, or between Jodl and Streicher. Of all the defendants, except the officers, the only one he know before the war was Frick from one or two official conferences in the Ministry of the Interior.

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He kept out of the NSDAP and his attitude towards its organisations was even in some sense inimical. His greatest worry during those years - as later right to the end - was the danger of party influences in the armed forces. Jodl did what was in his power to prevent the SS being "puffed up" into a subsidiary Wehrmacht, to prevent the handing over of the customs frontier-guards to Himmler (German transcript p.10 784), and he notes triumphantly in his diary that, after the withdrawal of Col.Gen. Baron von Fritsch, Hitler did not, as was feared, make Gen. von Reichenau, who had party ties C-in-C of the army, but the unpolitical Gen. von Brauchitsch, etc. If Jodl had conspired for National-Socialism in any way, he would have behaved in the opposite manner on each of these points.

Jodl was also not present at any of the so-called "meetings of conspirators." Neither on the 5.11.1937 (Hitler's testament remained unknown to him) nor at the Obersalzberg in February 1938, nor at the meeting on the 23.5.1939 or the 22.8.1939. No wonder! Jodl was, after all, at that time still much too small

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a man to be brought in on occasions which were of such decisive importance to the state: people don't conspire with lieutenant Colonels or Colonels on the General Staff; they are simply told what they are to do, and that settles the matter as far as they are concerned.

However the most incontrovertible proof that Jodl can have belonged to no conspiracy to wage aggressive war is his 10 months' absence just before the war began.

Jodl had left the OKW in October 1938 and was sent to Vienna as an artillery commander. At that time there was, in his view, so little probability of a war that, before leaving Berlin, he drafted, on his own initiative, a covering deployment in all directions. In this he moved the mass of the German forces to the centre of the Reich, because he could not see any, in any way definite opponent against whom a deployment plan would have had to be prepared (German transcript, p. 10 856). Exactly a year before the beginning of the attack, this alleged conspirator

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for aggressive wars drew up a purely defensive general staff job. And although he knew definitely that in case of war he would have to return to Berlin, this possibility seemed to him to be so distant that he transferred to Vienna with all his furniture. And still further: as he wished to get away from office work again at last, he had the mountain division at Reichenhall promised him for the 1 October 1939. And lastly: as late as July he got himself shipping tickets for a sea trip planned to last several weeks, which was to have begun in September. So sure was he of a peaceful further development.

During these 10 months up to the time he was called to Berlin shortly before the outbreak of war, Jodl had no official or private connections with the OKW. The only letter he got from them at that time was the one which promised him his transfer to Reichenhall on the 1 October. Note that at the most critical time, at the very time when the alleged conspirators were discussing and working out the Poland plan, Jodl was

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out of all contact for 10 months with the authoritative persons and knew no more of what was happening than one of his Second Lieutenants. When the Fuehrer came to Vienna during this summer, it did not even seem worth while to Keitel to introduce Jodl to him, although Jodl was called upon in the event of war to carry out the alleged common aggressive plan as strategic adviser to the Supreme commander. One can imagine how astonished Jodl was to read in the Indictment that he had been a member of a conspiracy to launch the war.

But perhaps it is asserted that Jodl only joined the conspiracy after 1939.

As a previous speaker has already explained, an officer who cooperates, in the place indicated for him, in carrying out a war plan can never be considered a conspirator. He does in fact have a plan in common with his superior, but he has not adopted it willingly, nor has he concluded an agreement, but, within the normal order of service, he simply does what the post he occupies demands.

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Jodl can be considered a typical example of this. He did not go to Berlin on his free decision. It had already been laid down long before that he had to enter the Fuehrer's staff in case of war. The arrangements for the current mobilisation year laid this down. This mobilisation year ended on the 30 September 1939; for the following year Gen. von Sodenstern was already designated as Chief of the Wehrmacht Operational Staff. So if the war had broken out 6 weeks later, Jodl would have entered the war as commander of his mountain division. He would then in all probability not be on this defendants' bench today. One sees that his whole activity in the war was fixed by a ruling which was independent of his will and had been laid down in advance long before. This fact is, in my opinion, in itself already striking proof that he did not participate in a conspiracy to wage wars of aggression.

When Jodl reached Berlin on the 23.8.1939, the beginning of the war had already been laid down for the 25.8. for reasons unknown to him it was then

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postponed another 6 days. The plan for the Polish campaign lay ready. He did not need to conspire to produce it. If a conspiracy against Poland existed at that time, the co-conspirators were quite somewhere else, as we now know as a result of the secret German-Russian treaty.

Jodl was not introduced to the Fuehrer until the 3 September 1939, i.e. only after the war had begun, at a time when what had to be decided had already been decided.

From then on his official position brought him close to Adolf Hitler. One must actually add: close to him physically only. He was never really close to him. Now, too, he did not learn Hitler's plans and intentions, and was only let into them as the occasion arose, to the extent that his work absolutely demanded: Jodl never became Hitler's confidant and never had cordial relations with him. It remained a purely official relationship- and often enough one of conflict.

In other ways too Jodl had remained a stranger to the party. There is no idea of his having sought contact in Vienna for instance with the party leaders there, although this would have been natural enough.

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Most of the party leaders and most of the defendants he came to know only when they visited the Fuehrer's HQ from time to time. With the exception of the officers, he continued to have no relations with them. The party clique in the headquarters he hated and considered it an unpleasant foreign body in the military framework. He never ceased to fight against party influences in the Armed Forces.

He still did not participate in party functions. He did not participate in Reich party rallies, apart from the fact that he once watched the Wehrmachts' exhibition there, having been ordered to officially. He avoided every one of the Munich anniversaries on the 9 November.

The prosecutor repeatedly brought in his Gauleiter speech to prove that, in spite of all this, Jodl identified himself with the party and its efforts, that he was after all not a soldier but a politician and that he was an enthusiastic supporter of Hitler's.

Here one must first note: the document L 172 which is presented to us as this Gauleiter speech is not the manuscript of this speech out a collection of materials put together by his staff, on the basis of which

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Jodl then drafted his manuscript. Over and above this, the speech was ma extempore; not a single word of this document proves that Jodl really spo it.

Also the occasion of the speech must be taken into account. After 4 hard years of war, after the breaking off of Italy which had just taken place and beforethe fresh, terrific burden which Hitler planned to impose on the population as the l extreme effort, - at this critical moment everything depended on the peopl will to continue remaining intact. For this reason, the party tried to get expert information upon the war situation so as to be able to buoy up the sinking courage again. For this task the Fuehrer earmarked general Jodl, - no doubt the only competent person. Some people would have welcomed this opportunity to make themselves popular with the Party leaders, but Jo l accepted the task against his will. The title of the lecture is:" The milit situation at the beginning of the fifth year of war." Its contents are a purely objective

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description of the war situation on the various fronts and of how this situation was created. The beginning and the end give-at least according to the document before us- a paean of praise to the Fuehrer fr which the prosecution draws doubtful conclusions. When a lecturer has fi and foremost to win the confidence of his listeners, these consisting of Party leaders, and when his task is to spread confidence in the supre military leadership, then such rhetorical phrases are something quite und standable.

Besides, Jodl does not deny that he sincerely admired some of the Fuehrer's qualities and talents. But he was never his confidant or his fellow-conspirator and he remained in the OKW too the nonpolitical man he always was.

Jodl was therefore not a member of a conspiracy. No concept of a conspiracy can help to make him responsible for actions which he did not himself commit as a guilty man.

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And now I will deal with these individual actions with which Jodl is reproached.

According to Article 6 of the Charter, the Tribunal is competent to deal with certain crimes, against the peace, against the Laws of war and against humanity, which crimes are specified in the Charter and for which the personal criminal responsibility of the guilty individual was laid down. If we disregardfor the time being the crimes against humanity, which come under a special heading there are two preliminary conditions under which the individual punishment of the defendants can take place:

1) There must be a violation of International Law of which they were co-guilty in some respect. The meaning of this whole trial and the meaning of the Charter after all lies in the fact that the force of the rules of International Law is to be strengthened by penal sanctions. If, therefore some special kind of violation of International Law is committed, not only the responsibility of the particular country which violated the law will come in as heretofore, but in addition guilty individuals are also to be punished for it in future. Therefore: There can be no punishment without a breach of International Law.

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2) But provision is not made for such a responsibility of individuals in the case of all breaches of International Law, but only for those which are explicitly named in the Charter. Article 6 a) specifies the crimes against peace, para b) crimes against the laws and usages of war. Other actions, even if they are contrary to International Law, do not belong here.

Quite a few court sessions could have been saved if the prosecution had taken these two points into account right from the beginning. Because as is to be shown yet-there is a tendency to accuse the defendants beyond the limits of actions contrary to International Law which are not specified in the Charter ; but this is not all: they are to be called to account also for deeds which are not at all contrary to law, but which can at most be considered as unethical.

In the following points I stick to the clear arrangement of the Anglo-American trial brief and add to it what was brought up against Jodl by the two other prosecutors.

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Point 1 The collaboration in the seizure and consolidation of power by the National Socialists has-as already pointed out- been dropped.

Point 2) and 3) concern rearmament and the re-occupation of the Rhineland. Jodl had nothing to do with the introduction of general compulsory military service nor with rearmament.

Jodl's diary contains not a single word about re-armament. He was a member of the Reich Defence Committee, which was not, however, concerned with re-armament questions. He was here concerned with the measures which were to be taken by the civil authorities in case of mobilisation. There was nothing illegal in that. We were not forbidden to mobilise, for instance in case of an enemy attack. The preparations in the demilitarised zone which were proposed to the Committee by Jodl limited themselves also to the civil authorities and consisted only of preparations for the evacuation of the territory west of the Rhine in order to defend the line of the river Rhine in case of a French occupation. The preparations were purely of a defensive nature.

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If, in spite of that, Jodl recommended that these defensive measures be kept very strictlyby secret this is not evidence of any criminal plans, but only the natural thing to do. As a matter of fact, particular caution was imperative, for the French occupation of the Ruhr was still fresh in peoples memory.

Neither had Jodl anything to do with the occupation of the Rhineland; he learned about it only five days before the execution of this decision of the Fuehrer's. Further statements are superfluous, for according to the Charter neither re-armament nor the occupation of the Rhineland- whether they were contrary to International Law or not- belong to the criminal actions under article 6.

These cases would come under the Charter only if a preparation for aggressive war was seen in them. But who would have thought of an aggressive war at that period ? In 1938, owing to lack of trained troops, we could not have put into the field one sixth of the number of divisions our expected enemies, France, Czechoslovakia and Poland, could have produced. The first stage of re-armament was supposed to be reached in 1942, the Western Wall was to be completed by 1952 , heavy artillery was lacking entirely, the tanks

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were at the testing stage, the ammunition situation was catastrophic. In 1937 we did not possess a single capital ship, as late as 1939 we did not have more than 26 seagoing U-boats, which was less than one tenth of the British and French figure. As far as war plans are concerned there existed only a plan for the protection of the Eastern frontier. The description of our situation in the Reich Defence Committee is very typical: it was said, in a matter of fact way, that a future war would be fought on our own territory, hence that it could only be a defensive war (. . . . .). This-please note- was a statement made during a secret session of this Committee. The possiblity of offensive action was not mentioned at all. But we were then not capable of serious defensive action either. For this very reason the generals thought of themselves as gamblers already at the time of the occupation of the Rhineland. But that any one of them could have been sufficiently utopian to think of an offensive, there is not even the semblance of any evidence for thinking.

Doc.Book I p.14, Jo.6

As Points 4) - 6) the Trialbrief designates:

Participation in the planning and execution of the attack on Austria and Czechoslovakia.

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a) A deployment plan against Austria did not exist at all. The prosecution quoted the document C 175 as such. But this is a misunderstanding. It is a programme for the elaboration of the most various war plans, for instance for the war against England, against Lithuania, against Spain etc. Among these theoretical possibilities of war, the "Fall Otto" is also mentioned, i.e. an intervention in Austria in case of an attempt to restore the Habsburgs,. It says in the document that this plan is not to be elaborated but merely to be "thought out ". But, as there was no indication whatsoever of such an attempt by the Habsburgs, nothing at all was prepared for this.

Jodl did not attend the meeting on the 12 Feb. 1938 at Obersalzber Two days later came the order to propose certain deceptive actions, obviously in order to put pressure on Schuschnigg so that he should comply with the Ob rsalzberg agreements. There is nothing illegal in t even if the prosecutor speaks about " criminal methods."

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Jodl was completely surprised 2 days before its execution by the Fuehrer's decision to march in. The Fuehrer gave this order to march in by telephone. Jodl's written order served only to file it. If this had been the authoritative order, it would after all have come much too late. It was issued at 0 900 hours on the 11th March and the march in took place on the following morning. Its course was described to us. The troops had purely peace-time equipment. The Austians crossed the border to meet and welcome them. Austrian troops joined the columns and marched with the German troops to Vienua. was a triumphal procession with cheers and flowers.

b) The case of Czechoslovakia follows.

As late as the spring of 1938 Hitler stated that he did not intend " to attack Czechoslovakia in the near future" (compare PS 388 of the 30 May 1938). After the partial Czech mobilization, which was unprovoked, he changed his view and decided to solve the Czech problem at the 1st Oct. 1938, and not on the 1st Oct 1938, as long as

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there was no interference to be expected from the Western Powers (Document Book I p.29). Jodl was therefore to make the preparations concerning the General Staff. He did it in the conviction that his work would remain theoretical because- as the Fuehrer wanted under all circumstances to avoid a conflict with the Western Powers - a peaceful settlement was to be expected. Jodl tried to achieve only one thing - that the plan should not be interfered with by Czech provocation (Doc.Vol I p.34). And really things happened as he expected they would. After the examination by Lord Runciman had shown the untenableness of the racial conditions in Czechoslovakia and the justification of the German national point of view, the Munich arrangement with the Western Powers took place.

Jodl is reproached with having proposed in a memorandum that an incident might be "organised" as a motive for marching in. He has given us the reasons for it. But the incident did not take place. This memorandum is not a breach of International Law,

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even if only because it is a question of internal considerations which never achieved importance outside. And even if this idea had been put into execution, such guiles have always been used, ever since the Greeks built their Trojan Horse. Ulysses the initiator of this idea, is praised for this by the ancient poets as " a man of great cunning" an not branded as a "criminal". I do not see anything unethical in Jodl's behaviour either, for, afterall, in the relations between states somewhat different ethical principles are applied from those in boarding schools for young Christian girls.

c) The occupation of the Sudetenland itself was carried out just as peacefully as that of Austria. Greeted enthusiastically by the liberated population, the troops entered the German areas, which had been evacuated to the agreed line by the Czech troops. Both these marchings in are not crimes according to the Charter. They were not attacks (this presupposes the use of force) still less wars (they presuppose armed fighting), let alone agressive wars. To consider such peaceful

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invasions as " aggressive wars" would be to exceed even the notorious conclusion based on analogies, of National Socialist criminal legislation. The four signatory powers could have included these invasions, which were still a recent memory, in Article 6, but this was not done because it was obviously intended to restrict the completely new kind of punishment of individual p rsons to wars, but not to penalise such unwarlike actions. Generally speaking, it must be said: any interpretation of the penal rules of the Charter which extends them is inadmissible. The old saying applies: "privilegia stricte interpretenda sunt". Here we have an example of privilegium odiosum. Indeed there has probably never been a more striking example of a privilegium odiosum than the unilateral prosecution of members of the Axis Powers only.

Now one could also get the idea of making Jodl responsible for having drafted an invasion plan against Czechoslovakia at a time when a peaceful settlement was not yet ensured.

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But Jodl reckoned with a peaceful settlement and had good reason to expect He therefore lacked the intention of preparing an aggressive war.

To this statement of facts which exclude Jodl's guilt must be added a legal consideration: We have decided - and there should be no doubt about it: There is no punishment for crimes against the peace without a violation of International Law. Now if the Charter makes preparations for aggressive war subject to punishment, it clearly means that a person who prepared an aggressive war which actually took place should be punished. On the contrary, war plans, which remained nothing but plans, not belong here. They are not contrary to International Law. International Law is not concerned with what goes on in peoples heads and in offices. Things which are immaterial from the international point of view are not contrary to International Law. Aggressive plans which are not executed in the same way as mere aggressive intentions - may be unethical, but they not contrary to law and do not come under the Charter.

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It is here a question of plans which were not carried out because the peaceful occupation of the Sudetenland based on international agreement was not an aggressive war, and the occupation of the rest of the country , which furthermore was accomplished without resistance and without war, no longer had any connection with Jodl's plans.

This occupation of the rest of the Czechoslovak territory in March 1939 need not be discussed in greater detail here. For Jodl was at the time in Vienna and did not take part in this action. Neither did he have anything to do with its planning. For it has no connection what-so-ever with Jodl's former work in the General Staff. Since then the military situation had changed completely: The Sudetenland with its frontier fortifications was in German hands. The unopposed march which then took place, therefore followed totally different plans, if such plans existed at all. Jodl did not take part in this march in itself.

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Point 7 of the Trial brief regarding war tension against Poland: the essential things have already been said on this subject: At the moment when Jodl left Berlin, no deployment plan against Poland existed when he returned on the 23 August 1939 the intention existed to enter Poland on the 25th. The plan for this was naturally ready, Jodl did not have a share in it.

The prosecution stresses further that Jodl was present in Poland in the Fuehrer's train on the 3rd September and that this was a proof that he took part in the war. Is this too a reproach against a soldier?

Point 8 of the Trial brief concerns attacks on the seven countries from Norway to Greece. The Trial brief gathers these seven wars together into one point-quite rightly too. They form one unit, because all of them resulted with military necessity and with logical consequence from the Polish war and from England's interference.

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It is for this very reason that the fact that Jodl had nothing to do with the unleashing of the war against Poland is so important when judging him.

The historians will have to do a lot more research work before it is known how everything really came about. The only criterion for the judgment of Jodl's behaviour is how he saw the situation at its various stages, whether, according to that what he knew, he considered Hitler's various decisions to wage war justified and to what extent he influenced developments. That is all that we are concerned with here.

a) Norway-Denmark.

In autumn 1939 the (German) Navy feared that England would gain a footing in Norway; the Navy had to reckon with this as a result of the experiences of the first world war and considering the possibilities of aerial warfare, and was undoubtedly right in thinking that an English action of this kind would be simply a blow, decisive for the outcome of the war. Then the German Fleet would be cut off from the Atlantic, the import of iron ore from Northern Sweden by sea would be impossible, the German ports in the Baltic would be absolutely unsafe and soon unserviceable,

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the whole of northern Germany would be endangered by English air squadrons based in Norway ; Denmark and Sweden, without regard to their governments' desire to remain neutral, would have to be at England's disposal at least as regards the air, for operations against Northern Germany. Hitler said that he desired the maintenance of Norway's neutrality. This seemed natural to Jodl, because, if this neutrality ceased to exist, it meant that Norway would become either an English sea and air base with the above described consequence or, if occupied by Germany, would continuously pin down over 20 divisions of German troops. According to the available reports, however, Hitler came - as he said- to the conviction that the Norwegian Government was not keepin or could not keep the country out of the English sphere of influence. And really, at the latest in the spring of 1940, a part of Norwegian territory, namely its territorial waters, was from a military point of view in English hands as is proved by the mine fields and the "Altmark" incident. De facto this country was no longer neutral. As Jodl saw it,

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the question for Hitler was in no way whether or not Norway would stay neutral, but whether Norway would for the duration of the war, come completely into England's military sphere of power, or whether this could be prevented by Germany before it was too late.

It was the same alternative seen by England and the U.S.A. regarding Iceland: they wanted to prevent the Germans laying hands on the island,- as they feared- , and thus making England's military position much - perhaps fatally - worse.

The Danish question is merely an accessory.

Jodl heard for the first time in November 1939- and this from Hitler himself - about the fears of the German Navy that England intended to go to Norway. He then received information which left no doubt that these fears were basically right. He also had regular reports according to which the waters near the Norwegian coast were coming more and more into the English sphere of domination so that Norway was no longer neutral.

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Jodl was firmly convinced - and still is today- that the German troops prevented the English landing at the last minute. No matter how Hitler's decision may be judged legall Jodl did not influence it, he considered the decision justified and was bound to consider it as such so, even if one wished to regard Hitler's decision as a breach of neutrality, Jodl did not give criminal help by his work on the General Staff.

b) Belgium -Holland- Luxemburg.

Like every military expert, Jodl knew that, if Germany was to fight the war in the West to its conclusion, there was no other course but a military offensive. In view of the inadequacy of the German equipment at the time and the strength of the Maginot-line, , there was, however, from a military point of view, no other possibility for an offensive than through Belgium.

So Hitler was, for purely military reasons, faced by the cessity of operating through Belgium.

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But Jodl also fully knew as did every German who experienced August 1914, how difficult a political decision was faced thereby as long as Belgium was neutral, i.e. was prepared and in a position to keep out of the war.

The reports which Jodl received and against the accuracy of which no justified doubts could arise now showed that the Belgian Government was already co-operating in breach of her neutrality with the general staffs of Germany's enemies. This, however, can be dropped here in the defence of Jodl. It suffices to know- and this is incontrovertible - that part of Belgium's territory, i.e. the air over it, was being continuously used by Germany's Western enemies for their military purposes.

And this applies perhaps even more strongly to the Netherlands. Since the first days of the war, British planes had flown over Dutch and Belgian territory as and when they pleased. Only in some of the numerous cases did the Reich government protest, and these were 127 cases.

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The prosecution does not put the legal question correctly. Before air warfare gained its present important position, conditions were such that a state which wished to remain neutral could withhold its territory from continual military use by one of the belligerents as and when the latter wished, or else give clear notice of the termination of its neutrality. Since air warfare became possible, a state can hand over, or have to hand over, to one of the belligerents the air over its territory and yet remain outwardly and diplomatically neutral. But, by the very nature of the idea, the defence of its neutrality can be claimed only by a state whose whole territory lies de facto outside the theatre of war.

The Netherlands and Belgium were long before that 10th of May no longer de facto neutral. For the air over them was, in practice with or against their will freely at the disposal of Germany's enemies. What contribution they thus made towards England's military strength, i.e. towards the strengt of only one of the belligerents, is known to everybody. It is necessary only to think of Germany's Achilles' heel: the Ruhr.

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Our Adversaries clearly maintained the point of view that, when the barrier constituted by Holland and Belgium protects our industrial areas against airattacks, their neutrality, was to be disregarded; but when it protected France and England, its violation was a crime.

Jodl naturally realized the situation . His ppinion on the legal question was, of course, a matter of complete indifference to Hitler . His activities remained here too the normal activities of a General Staff officer.

c) Greece.

Hitler wanted to keep the Balkans out of the war, but Italy had attacked Greece against his will at the beginn of October 1940. When the Italians got into trouble a request was made for German help. Jodl advised against it, since then English intervention in the Balkans would have to be reckoned with and every hope of localising th Italo-Greek conflict would thus be lost.

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Hitler then ordered everything to be prepared for the necessit which might perhaps nevertheless arise, if German help for Italy against Greece became inevitable (Orders of the 12th November and 13th December 1940).

If the attempt to localize the Greek-Italian conflict did not succeed, it was clear that Greece would be involved in the great German - English struggle. The question was now whether her territory would lie within the war zone controlle by the British or the Germans. And as, in the case of Norway, Belgium and Holland, part of the territory of these countries was already at England's disposal, before the beginning of open hostilities and they were therefore, de facto at least, no longer neutral-perhaps could not longer be neutral - so it was also with Greece now. The prosecution on Greece establishes that British troops were landed on the Greek main land on the 3rd March 1941, after Crete had already some time before come, within the area controlled by the British. Hitler did not give permission for aerial warfare at Crete until the 24th March 1941 and began the land attacks only on the 6th April.

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Here too Jodl had no influence on Hitler's decisions. He could have no doubt that Hitler's decision was inevitable as the war between the world powers was now developing. There was no choice: ever increasing parts of Greek territory would have been drawn into the sphere of English power and would have become the jumping - off points for bombing squadrons against the Roumanian oilfields, had Germany not stopped this process. Moreover, the experiences of the first world war were frightening: the coup de Grace was then made from Salonica.

d.) Yugoslavia.

Hitler wanted to keep Yugoslavia out of the war too . The German troops in the Balkans had the strictest orders to respect its neutrality rigorously . Hitler even declined the application by the Chief of the Army General Staff to ask the Yugoslav Government for permission to let sealed trains with German supplies through their territory.

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The Simovic putsch in Belgrade on the night after Yugoslavia joined the Tripartite pact was considered by Hitler as a malicious betrayal. He was of the opinion that the change of Government at Belgrade, which altered the course of its foreign policy 180 degrees, was only possible if England or the Soviet Union or both had provided cover from the rear . It was now certain that the Balkans would be fully drawn into the war tangle. He was certain that the German troops in Bulgaria were directly threatened and also the German Line of Comminication which ran close to the Yugoslav frontiers.

Under these conditions , Hitler took the decision for war on the morning following the Belgrade putsch. Jodl's suggestions, and later Ribbentrop's too, to make things unambiguous by means of an ultimatum, were not considered at all. He wanted to make sure that Yugoslavia and Greece should not come into the sphere of influence of England but into that of Germany. The next day's news concerning Moscow's telegram of friendship to the Belgrade Putsch

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Government and about the Yugoslav deployment then already in progress (confirmed by the statement of General von Greiffenberg, Doc. book III. A J. 12 (Jo.65), and lastly the Russo-Yugoslav Friendship pact were for Jodl irrefutable signs that Hitler had seen the connection of events correctly.

The decision to fight was taken by Hitler, and by Hitler alone.

Point 9 concerns the aggression against the Soviet Union.

What each of the two Governments, that of Berlin and that of Moscow, wished to achieve by the agreement of the 23-8-1939 is to-day not certain. One thing is, however, certain and that is that these partners who were up till then enemies, had not entered into a marriage of love. And the Soviet Union was for the German partner a completely mysterious quantity.. And it remained so too. Anyone who does not consider this fact can in no way judge Hitler's decision to make a military attack on the Soviet Union,

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and above all the question of guilt.

If anywhere, it was in the Russian question that Hitler came to a decision without listening to the slightest advice from anyone to say nothing of taking it. He wavered for many months in his opinion about the intentions of the Soviet Union.

The relations of the armies of both sides on the demarcation line were from the very beginning full of incidents. The Soviets at once occupied the territories of the Baltic States and of Poland with disproportionately strong forces.

In May and June 1940, when there were only 5 to 6 German covering divisions in the East, the Russian deployment against Bessarabia with at least 30 divisions, reported by Canaris, and the deployment into the Baltic territory caused great anxiety. On the 30-6-40 apprehensions were again allayed so that Jodl - as the Document PS 1776 has shown - even thought that Russia could be counted on as a helper in the fight against the British Empire. But in July there were renewed worries. The Russian influence was advancing energetically in the Balkans and the Baltic territories.

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German transcript page 10 888

Hitler began to fear Russian aggressive intentions as he told Jodl on the 29 July.

The sending off of several divisions from the West, where they were no longer required, actually had nothing to do with this. It occured at the request of the Commander-in-Chief in the East who could not fulfil his security task with his weak forces.

Hitler's worry concerned above all the Rumanian oilfields. He would have liked most to eliminate this threat already in 1940 by a surprise action. Jodl replied that, owing to the bad deployment possibilities in the German Eastern territories, this could not be considered before winter. Hitler demanded verification of this opinion. Jodl arranged for the necessary investigations in a conference with his Staff in Reichenhall, which was obviously misunderstood by the Russian prosecution. On the 2nd August Hitler ordered improvements to be made in the deployment possibilities in the East, - a measure which was no less indispensable for defence than for an offensive.

Document book I, p. 85 (Jo 33)

Towards the end of August - this is the order of the 27th August - 10 Infantry Divisions and 2 Panzer-Divisions

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were brought into the Government-General in case a Blitz action should become necessary for the defence of the Rumanian oilfields. The German troops, now totalling 25 divisions, were certainly intended to appear stronger than they really were, so that an action should be unnecessary. This is the sense of Jodl's order for counter-espionage (PS 1229). Had there been aggressive intentions then, there would rather have been an attempt to make one's own forces appear smaller than they were.

At the same time Hitler appears to have given the General Staff of the army, orders - without Jodl knowing anything about it, - to prepare an operational plan against Russia for any eventuality. In any case, the General Staff of the army worked on operational plans of this kind from 1940 onward (General Marcks and then General Paulus).

Unfavourable information then accumulated after the Vienna award on the 30th August 1940. If Jodl was to believe his utterances, Hitler was becoming convinced that the Soviet Union had firmly resolved

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to annihilate Germany in a surprise attack while she was engaged against England. The leaders of the Red Army had (according to a report of the 18th September) declared a German-Russian war to be inevitable (Doc. C 170). In addition, reports came in of feverish Russian preparations along the demarcation line. Hitler calculated on a Russian attack in the summer of 1941 or winter of 1941/42. He thus decided, should the discussions with Molotov not clear up the situation favourably, to take preventive steps. For then the only chance for Germany lay in offensive defence. For this case of emergency, preparatory measures were ordered by Hitler on the 12-11-1940 (PS 444.)

The failure of the discussions with Molotov decided the question. On the 18-12-1940 Hitler ordered the military preparations. Should the coming months clear up the situation, all the better. But it was necessary to be prepared in order to deliver the blow in the spring of 1941 at the latest.

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This was presumably the latest possible moment, but also the earliest, since more than four months were required for the deployment.

Jodl, as an expert, emphatically pointed out to Hitler the enormous military risk, the undertaking of which could be decided upon only if all political possibilities of averting the Russian attack were really exhausted. Jodl came to the conclusion at that time that Hitler had exploited every possibility.

German transcript p. 11100

The situation grew worse. According to the reports which were received by the Army General Staff, at the beginning of February 1941, 155 Russian divisions, i.e. 2/3 of the total Russian strength known to us, had deployed opposite Germany. But the first stage of the German deployment had just begun.

German transcript p. 10 892

The Government's telegram of friendship to the participants in the Belgrade Putsch on the 27 March 1941 destroyed Hitler's last hope. He decided upon an attack, which actually had to be postponed for more than a month owing to the Balkan war.

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The deployment was undertaken in such a manner that the fast German Units, without which the attack could not be conducted at all, were brought to the front only in the last two weeks, i.e. after the 10th June.

German transcript p. 10893

Real preventive war is one of the indispensable means of self preservation, and was indisputably permitted according to the Kellog-Briand-Pact. The "Right of Self-Defence" was understood thus by all the signatory states.

If the situation was wrongly conceived, the German military leaders are not to be blamed for their error. They had reliable reports on Russian preparations which could only have sense if they were preparations for war.

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The reports were later confirmed. For when the German attack met the Russian forces, the leadership of the German front got the impression of running into a gigantic deployment against Germany. General Winter developed this here in detail in addition to Jodl's statements, particularly with regard to the enormous number of new aerodromes near the line of demarcation, and he drew particular attention to the fact that the Russian staffs were provided with maps of German territories. Field Marshal von Rundstedt also confirmed this as witness before the Commission. This will come before the court during the further course of the trial.

Jodl firmly believes that Hitler would never have waged war against Russia unless he had been absolutely firmly convinced that no other path lay open for him at all. Jodl knew that Hitler knew the danger of a two front war fully and would risk the victory over England - which he thought was no longer in doubt - only in an inescapable emergency.

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Jodl only did his job as an officer of the General Staff. He was convinced, and still is today, that we were waging a genuine preventive war.

Point 10 finally brings the war against the USA. That Jodl did not intend to increase the number of our enemies by a world power, is obvious, and also shown by documents. German transcript pp.10894 - 10 897).

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II.

Now what is the position with regard to the responsibility for these compaigns? A declaration of war is a decision in the field of foreign politics, the most important one in the whole of this field.

It depends on the constitutional structure of the concrete state as to who is responsible for this decision - politically, criminally and morally; it depends on the way the formation of a will in the field of foreign politics takes place in this state according to its constitution. Prof. Dr. J a h r r e i s s has spoken about this: in the Führer state it is exclusively the Fuehrer who has to make this decision. Anyone who advises him about this cannot be responsible, for, if what the Fuehrer orders has legal force, he who influences this order can not be acting illegally.

The Charter is obviously of the opinion that those who in anyway participate in the Fuehrer's decision or influence it are also co-responsible. If we take this legal conception as authoritative the question of responsibility crystallizes into a problem of competen

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In every community the spheres of tasks of its organs must be delimited, there must be rulings on competence laying down what each official is called upon to do and not to do. Thus in all states the relations between the military and the civil administration is naturally regulated, as also within the military and within the administration the spheres of tasks and the relations between their thousands of offices are regulated. If things were otherwise, chaos would reign.

Particularly in wartime the problem of competence in the relations between the political and military leadership is important. For the military are the most important instrument of policy and the assistant may easily try to become master - the military interfere in politics. It was a German tradition to avoid this. The Bismarckian empire already tried with great consistency to keep officers away from politics. They had no right to vote, were not allowed to go to political meetings and in fact any statement on politics werelooked upon askance. For it could in some way be

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looked upon as a taking of sides, whereas the taking of sides was severely banned. The military were to be politically blind, completely neutral and knowing only one point of view, which was that of legitimacy, i.e. subordination to the legitimate ruler. Thus in the years 1866 and 1870, when there was danger of war, it was not Moltke but Bismarck who advised the King as to the political decision. This changed during the last years of the first World War. General Ludendorff became the strongest man in the Reich owing to the force of his personality and the weakness of his political opponents. People often talk of German militarism. For the time when the soldier seized political power this was justified. The Weimar State got rid of this completely. The non-political character of the armed forces was stressed with all sharpness and the military again limited to its particular field. This went so far that a civilian was made Minister for war, who had to represent the armed forces politically in the Reichstag. For the longest time it was a Liberal-Democratic

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Minister, who was meticulously careful to avoid all political influence by the generals.

When founding the Wehrmacht, Adolf Hitler maintained this sharp distinction between politics and military, indeed he even stressed it in a certain sense. He, who wished to make the whole people politically minded, wanted a non-political Wehrmacht. The soldier was deprived of political rights, he was not allowed to vote or to belong to any party, even the NSDAP (as long as the old law on compulsory military service was in force). He also consistently kept his generals and highest military advisers away from any interference in political requirements. He also remained consistent towards his own party. When, after Fritsch had gone, as new C-in-C of the Army was to be appointed, it would have been easy enough to have chosen Reichenau, who had National-Socialist leanings, but he appointed von Brauchitsch. He did not want any political generals, not even National-Socialist ones. His point of view was that he was the Fuehrer and he the politician; the generals had to see to their own affairs, they knew nothing about politics. He did not even

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tolerate advice when it concerned politics. The generals did in fact, repeatedly venture to express doubts as to his political plans, but were obliged here to limit themselves strictly to purely military points of view.

This sharp division of political and military spheres of competence is, for that matter, not characteristically German. It applies also, if I see rightly, to Anglo-Saxon democracies, and indeed to a particularly strong degree.

At any rate it was so under Hitler: he made political decisions, and it was only on their military execution that the generals had any influence. It was their task to make the military preparations necessary for all political eventualities. But it was Hitler who pressed the button to set the machine in motion. The "whether" and "when" were decided upon by the Fuehrer. It was not for them to weigh the opportuneness, the political possibility or the legal permissibleness.

Psychologically this attitude of the Fuehrer became still more pronounced owing to the hardly

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comprehensible mistrust he felt towards his generals. A remarkable phenomenon, - anyone who disregards it can never come to understand the atmosphere which reigned in the Fuehrer's Headquarters. It was a mistrust of the - as he thought - reactionary attitude of the officers' corps. He never forgot that the Reichswehr had fired at him in 1923. This was, moreover, the natural mistrust of a military dilettante, who nevertheless wanted to be a strategist, towards the military expert, and also probably the mistrust of the political expert towards political dilettantes in officers' uniform. This mistrust of the political outlook of his military entourage was moreover by no means entirely unfounded. For the generals had wanted to put a brake on his rearmament plans, to hold him back from the occupation of the Rhineland and had expressed objections to his march into Austria, and to his occupation of the Sudetenland! And yet all these actions had succeeded smoothly and without bloodshed. The generals felt like gamblers when carrying the plans out,

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but Hitler was sure of his game. Is it to be wondered at that their political judgment did not carry too much weight with him, and is it to be wondered at that, on the other side, the apparent infallability of his political judgment met with more and more recognition?

Thus Hitler tolerated no interference in his political plans and the outcome of it, as has been drastically represented to us here, was that, had a general raised objections to Hitler's political decisions, he would not actually have been shot, but his sanity would have been doubted.

To receive advice was not the concern of this man of power at all. Thus, at the beginning of military undertakings, the chances of the plan were hardly ever considered in general discussions. None of the important decisions since 1938 came as the result of advice, on the contrary, the decision often came as a total surprise to the military command. Thus it was, for instance, with the march into Austria, of which Jodl learned two days before,

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or in the case of the attack on Jugoslavia, which was suddenly decided upon by Hitler and carried out without any preparations within a few days. The alleged "discussions" at the Fuehrer's quarters, the course of which the witness Field Marshal Milch described so clearly, were nothing else but the "issuing of orders".

Within the Wehrmacht too, of course, the spheres of competence of the individual departments were sharply divided, and the method which Hitler used in order to make these divisions as insurmountable as possible is of interest. This was achieved by the method of secrecy. Enough has been said about this, particularly about the so-called "Blinkers order", which forbade anybody to get an insight into anybody else's work. It thus happened that each department was isolated and strictly limited to its sphere of tasks. Obviously what Hitler desired to achieve by this system was that he should be the only one to get information from all sides, and that he should retain the reins in his hands as the only fully informed person.

Indeed, even more: he strengthened this

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system still more by only too often playing individual personalities, groups and departments off one against the other to prevent any conspiracy amongst them.

These methods were interesting, because they often inevitably came into conflict with one of the basic ideas of National-Socialism - the Fuehrer principle - but were carried through in spite of this: for instance, when the sphere of competence of two departments covered the same territory, such as perhaps the competence of a military commander and of Himmler in the same occupied territory. What was ordered by one did not concern the other, even though the carrying out of the order might encroach upon the arrangements for which the other was responsible. Thus the military commander was in no way the master in his territory. Things were the same in the civil administration too: there was the duplication of the Landrat (prefect) as a state functionary and the Kreisleiter (districtleader) as a party functionary of the Reich Governor, and the Gauleiter. Everywhere there was a dualism of powers and therefore a dissipation of power. There was method in this: it prevented lower

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organs becoming too strong and secured the power of the supreme leadership. It may be said epigrammatically that the Fuehrer principle was realized only in the Fuehrer.

What then was the position of Jodl's sphere of competence within all this machinery?

He was the chief of the operational staff of the armed forces, which was a department of the OKW coming under Keitel. Jodl's main task was, as the name of the department implies, to assist the Supreme Commander in the operational leadership of the armed forces. He was the Fuehrer's adviser on all operational questions - in a certain sense the Chief of General Staff of the armed forces. The task of this chief of general staff in all countries in which this arrangement is known, is not that of giving orders but of advising, assisting and carrying out. Even if from this alone, it follows that Jodl's position has frequently been misunderstood during the course of this trial.

1.) He was not Keitel's chief of staff, but the chief of the most important department of the OKW, though he had nothing to do with the other departments and sections of the OKW.

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He was also not Keitel's deputy. Keitel was represented by the senior departmental chief. This was Admiral Canaris and, in his absence, Jodl. But, as Keitel was present almost without interruption, he only had to be represented very rarely.

2.) It is also wrong when Jodl is designated by the prosecution as the Commander of one campaign or another. He had no power of command, let alone being in command of an army.

3.) It was also wrong when it was repeatedly said that Warlimont was present at the meeting of the 23 May 1939 as Jodl's "representative" or assistant. Warlimont was in the OKW, - Jodl had left the OKW in October 1938 and had nothing more to do with Warlimont in May 1939.

What results from all this with reference to Jodl's responsibility for the real or alleged wars of aggression?

In general, one can only be made responsible for what one does criminally whereas one should not do it,

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and for what one has criminally failed to do whereas one ought to have done it. What an officer or an officia- has to do or not do is a question of competence. So this is where the problem of competence assumes its importance for us. Let us look at it more closely:

Jodl is reproached with having planned and prepared certain wars which were breaches of international law. This reproach is justified only if it was within his competence to examine, before he carried out his task, the legality of the war which might be waged and to make his co-operation dependent on this decision.

This must be very definitely contested. Whether to wage a war is a political question and is the politician's concern. The question of h o w to wage war is the only question concerning the armed forces. The armed forces can suggest that the war is, in view of the opponent's strength, too risky or that the war can not be waged at a particular season, but the final decision rests with the politicians.

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I could in fact imgaine that the chief of the Operational Staff of the Armed Forces would become at least morally-guilty of complicity in a war of aggression, if he had incited the decisive quarters to bring about a war, or if, drawing attention to military superiority, he had advised the political leadership to exploit the moment in order to carry out extensive plans of conquest. In such cases one could call him an accomplice, because he - over and above hi military task - intervened in politics and provoked the decision for war. But if he plans and carries out the plan of war in eventu, i.e. in case the political leadership decide on war he does nothing else but his evident duty.

One should consider the extraordinary consequence which would arise from a contrary conception: the competent authority declares war, and the Chief of General Staff, who regards this war as contrary to International Law, does not co-operate. Or the Chief of General Staff is luckily of the same opinion as the Head of the State, but one of the army commanders

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has objections and refuses to march, another one has doubts and has to think it over first. Can a war be waged at all in this case, be it a war of defence or a war of aggression?

Such a conception of law would, in the future, lead to results which could not be vindicated at all. The Security Council of the Allied Nations has decided to set up a world police with the task of protecting world peace against aggression. And also the creation of a world General Staff has been considered which would have to plan and carry out this punitive war. Now let us imagine that the Security Council decides on a punitive war and the Chief of General Staff replies that in his opinion, there is no aggression. Would not the whole Security apparatus in this case depend on the subjective opinion of a single non-political person, i.e. would it not in fact become illusory?

I only add one more thing in passing: If this opinion should prevail, what efficient man would

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still decide to become a regular officer, if, on reaching a high position, he had to risk being put on trial for crimes against the peace in case of defeat?

It is, for that matter, wrong, even if only for practical reasons, to impose on a General the duty of examining the legality of a war. The General will only seldom be in a position to judge whether the State to be attacked by him has broken its neutrality or whether it threatens to attack or not. And furthermore: the conception of a war of aggression and of war contrary to law is, as Prof. Jahrreiss has explained, still completely uncleared and contested among the practitioners and theoreticians of International Law. And now, a General, who lives far apart from all these considerations, is to recognize, that it is his duty to carry out a legal examination?

But even if he had recognized the war as illegal, just let us imagine the really tragic position in which this General would find himself. On one side

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is his evident duty towards his own state, which he particularly took an oath to fulfil as a soldier, on the other side this duty not to support any war of aggression. A duty which forces him to commit high treason, and desertion and to break his oath. One way or the other he will become a martyr.

The truth is this: As long as there is no superstate authority, which impartially establishes whether, in a concrete case, such a duty does exist for the individual and as long as there is no superstate authority which will protect people who fulfil this duty against punishment for high treason and desertion, an officer cannot be held criminally responsible for a breach of the peace.

Under all circumstances a contradiction must here be pointed out, which the prosecution has fallen into : on one hand it reproaches the generals with not having been solely soldiers, but also politicians;

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on the other hand it demands of them that they should remonstrate against the political leadership and sabotage its resolutions - in short, that they should not solely be soldiers, but politicians.

The prosecution do actually acknowledge this up to a certain point. They say that it is not intended to punish the generals for having waged war -, for this is their task -, but they are reproached with having caused the war.

And the second argument, which often recurs, is that, without the generals as helpers, Hitler could not have waged these wars, and that makes them co-responsible

This argument contradicts itself. For the help which the generals gave Hitler, consisted in the planning and carrying out of the military operations, i.e. in waging the war, for which they can, in the opinion of the prosecution too, not be criminally accused.

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Let us look at this more closely: Jodl is said to have caused wars. It has been sufficiently proved that he played absolutely no part in the launching of the polish campaign. And it was this very campaign which, with strategic necessity, brought about all the further happenings.

Actually one need not examine the origins of the individual wars at all to be able to say, according to what we know now, that in this assertion there lies an enormous over-estimation of Jodl's power in the Hitler state. The resolution to start the war was far removed from his influence. Advice from the generals was not heard on this very point. At most, purely military considerations for and against could be submitted. And the Norwegian campaign was the only one of all these campaigns which a military man advised Hitler to carry out for reasons of strategic necessity. But that was not Jodl. As regards the latter, the assertion that he caused wars would be founded on nothing. Let the protocol, the memorandum or any other document be shown according to which Jodl at any time incited

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people to war, or even only recommended the resolution to start a war. His Gauleiter speech is produced against him. In it Jodl shows - looking back - how the events developed out of one another. For instance, how the Austrian Anschluss facilitated action against Czecho - slovakia, and how the occupation of Czechoslovakia facilitated the action against Poland. But it is bad psychology to deduce from this that a general plan for all this existed from the first. If I buy a book, which draws my attention to another one, and I then buy the latter as well, does it follow that, at the time of the first purchase, I already had the intention of getting the second one as well? If Hitler had extensive plans right from the start, Jodl did not know of them, let alone consent to them. His purely defensive deployment plan of 1938 already proves that by itself alone.

Every time a campaign had been resolved upon, he did indeed do his bit to carry it out successfully.

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It is this supporting activity which is the object of the second of the arguments mentioned earlier.

It is true that without his generals, Hitler could not have waged the wars. But only a layman can build up a responsibility on that. If the Generals do not do their job, there is no war, but one must add: If the Infantryman does not march, if his rifle does not fire, if he has nothing to clothe himself with and nothing to eat, there is no war. Is therefore the soldier, the gunsmith, the shoemaker and the farmer guilty of complicity in the war? The argument is based on a confusion between guilt and causation. All these persons, and many others too, effectively co-operated in the waging of the war. But can one therefore attribute any guilt to them ? Is Henry Ford partly responsible for the thousands of accidents which his cars cause every year ? If an affirmative answer is given to the question of causation, the question of guilt is still not answered. The prosecution even refrain from putting this question.

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The question of guilt will be discussed later. Here only the following is anticipated: A guilty participation in the planning and carrying out of a war of aggression presupposes 2 things:

1.) That the culprit knew that this war was an illegal war of aggression.

2.) That, by reason of this knowledge, it was his duty to refrain from co-operating in it.

The latter links up with what has already been mentioned: by virtue of his position, it was Jodl's duty to make plans: Whether they were used or remained unused, did not depend on him. It is characteristic that Jodl made a whole series of deployment plans which were never carried out. All General Staff tasks are only drawn up for an eventuality--in case the political leadership should "press the button". Often they did it, often they did not. That was no longer a matter for the General Staff Officer.

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The other presupposition for an accusation of guilt is that the culprit recognises the war as a war of aggression. The question is, therefore, how these things appeared to him. How they were in reality interests the historian. The decisive question for the criminal lawyer is: What reports were submitted to Jodl about the conduct of the enemy? Could it be taken from these reports, that the enemy was acting contrary to his neutrality, that he was preparing an attack on us, etc.-

The decisive point is not whether these reports were true but whether Jodl believed them to be true. I must stress this, because it has been said here at times: "the court will decide whether this was a war of aggression." That, of course, is true, because if the court decides that it was not a war of aggression, any sentencing for a war of aggression will fall out from the start. But if the court agrees that the war was, in fact, launched illegally, this does not in itself affirm the guilt of any person.

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Someone who takes someone else's watch in the belief that it is his own is no thief. The guilt is lacking, for had it really been his own watch, he would not have been liable to punishment. So if Jodl believed that facts existed which, had they been true, would have made the war a legally admissible one, a sentence for breach of the peace would not arise.

Now the Prosecution have repeatedly asked the Generals the ironical question how it conformed with the ethical code of an officer to assist in a war which they had recognised to be illegal.

Let us assume that Jodl was sure that the war was illegal and that he had, for reasons of conscience, refused to collaborate. What difference would there have been then between him and a soldier who throws away his rifle in battle and retreats? Both of them would be liable to the death penalty for disobeying orders in war.

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I know that the United States are generous enough to respect a soldier who, for religious reasons, refuses to take up arms and not to treat them as we do. But that doubtless does not apply to a man who, owing to objections based on international law, does not co-operate in the war decided on by the political leadership. One would object that it is not his affair, not an affair of conscience, to examine the admissibility of the war, but that this is the duty of the responsible state authorities. According to continental law, one would not even begin to consider such an excuse for refusing obedience.

Furthermore I regard that ironical question to the Generals merely as an attempt to lower them morally not as an accusation touching the subject of these legal proceedings. The International Military Tribunal is not a court of honour which decides about the actions of the accused as they concern honour, but a criminal tribunal which has to judge certain actions which have been declared criminal by the Charter. It appears to me that the prosecution forgot this fact on several occasions.

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Before I pass on to the last point--the eleventh of the Anglo-American trial brief, regarding crimes against the laws of war and humanity, I must make a few preliminary remarks.

First, a misunderstanding has to be cleared up. The prosecution says that we wanted to wage a total war and understands by total war a war which is waged by all methods, quite indifferent whether illegal or legal--in short a war during which the laws of war are ruthlessly violated. I was not a little surprised when I read this. We have indeed spoken enough about total war during the last seven years, but we understood something quite different by it. We describe as total war a war waged with all the means of the spirit, of manpower and of material and mobilising all the nation's forces; i.e. a change-over of the whole of economy to war needs, conscription of every single man capable of bearing arms and of every single

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able.bodied woman and if possible also of the young people etc. German soldiers from the East, who were familiar with Russia's example, jeered when we spoke of "total war"; had we not still 3 greengrocers on every street and tobacconists at every corner? It was no total war (they said) when so many workers were enrolled for non-military purposes—when whole factories were still producing articles which had no connection with the war etc. the war really had to be a total war (they said) if it was to be won, but has nothing at all to do with contempt for the laws of war. I have never heard the word interpreted in this sense.

In the Angle-American trial brief, Jodl is charged altogether with 3 documents (they concern: the Commando order and the capitulation of Leningrad. A fourth (PS 886) was subsequently withdrawn by the Prosecution).

The French and Russian Prosecuters have, however, made further additions.

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Again we must turn first to the question: wherein lay Jodl's responsibility as Chief of the Operational Staff of the Armed Forces?

As we know, Jodl was primarily the advisor of the Supreme Commander-in-Chief in the Operational leadership of the Armed Forces. This staff, however, had still other departments in addition to the Operational Departments of the three branches of the Armed Forces. When the operational tasks increased tremendously during the winter of 1941/1942, a division of work was arranged between the chief of the OKW and Jodl, according to which Jodl was only responsible for the military operations and the drawing up of the Armed Forces Report, while the Chief of the OKW worked on all other matters in connection with the Quartermaster Department and the organisational department of the Operational Staff of the Armed Forces. It follows from all this that Jodl had nothing to do with prisoners-of-war, for whom a special department in the OKW was responsible,-

nor with the administration of the occupied territories, and therefore nothing with the siezure of hostages and with deportations (I shall discuss UK 56 later).

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Nor did he have anything to do with police tasks in the zone of operations or in the rear military zone.

The Operational Staff of the Armed Forces had no authority to issue orders; nevertheless, there are many orders to which Jodl signed either "by order" or with his own "J".

We must now thoroughly discuss these orders and the responsibility for them:

1.) There are orders which commence with the words "The fuehrer has ordered" and are signed by Jodl, or signed by Keitel and initalled by Jodl. These are orders which were given by the Fuehrer orally, with the order to Jodl to draft them or put them into writing. With regard to the responsibility, the same applies here fundamentally as for the orders signed by Hitler. For, in order to determine the responsibility, one must ask the question: What was the task of the person to whom the order was communicated? What was it his right and his duty to do?

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When the contents of the order were fixed in all their essential points, Jodl's task was only a formal one: he had to word what was already established, to give it the usual shape of a military order, without being allowed to alter anything in its contents. It must not be overlooked that the criminality of an order can only lie in its contents and that it was precisely the contents which a subordinate had no influence on here. There the reason for the impunity of the subordinate does not lie in the order of his superior officer to act thus or thus, but in the lack of competence to alter anything in the given facts. If the prosecution then sees in the formulating of the order criminal assistance, it is impossible to agree with this. In the first place, because it is an order of the Fuehrer's which creates law and in the case of which criminal assistance is impossible.

But even this is not accepted, and a Fuehrer's order is, on the contrary, considered as contrary to law and as punishable,

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one can still not get over the fact that it was not odl's business to examine the legality, but only to draw up the Order technically correctly, i.e. in accordance with the will of the author of this order. If he did this and only this, he has no responsibility. Here the superior essentially gave the order himself, and the subordinate just put it into words. This becomes quite clear when we place the technical nature of his task beyond doubt. For example, the superior dictates the order to his secretary, who is a lawyer in civil life and recognises its illegality. Is it his duty, or even his right to lay down his pen and say: I'm not writing this? I am sure no one will make the secretary responsible if he does not do this. But a man who puts the order he has been given into words, should on principle not be treated differently from the one who puts it on paper. People actually want to make a difference between a clerk being given the job of writing down the order and a senior general.

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The latter too will not have the legal, but perhaps he will have the moral duty of expressing his scruples to his superior. Jodl actually always did this; this was the least of his various methods to prevent an illegality, to which I shall refer later.

2.) Another very frequent case is where Jodl signed his order "I. A.", i.e. "Im Auftrag" (by order) or also initalled with his "J" orders signed by Keitel. Where does the responsibility lie here? We shall have to differentiate here between military and legal responsibility. From the military point of view, the superior, by whose order the order is signed, is responsible for it. Criminal law, however, lays the emphasis on the guilt, i.e. it wants to find the real culprit, not the person responsible from the military point of view. As, however, the owner of the initial or the person signing "by order" is mostly the the author of the

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document, it may happen that the latter is responsible for purposes of criminal law, although he is not responsible in the military sense. For this reason it is necessary here to ascertain the actual share of both signatories in each case, and to determine the culpability accordingly.

3.) Where Jodl did not affix his initial on the right below the last word of the document, but on the top right hand corner of the first page, it means merely that the document was submitted to him for his information. It does not say whether he actually read it or approved of it. Initials affixed in this manner do not, therefore, by themselves bring the initialler into any connection with the order for criminal purposes.

4.) Jodl is also being charged now with certain notes, partly so-called "memoranda", partly handwritten remarks which he wrote on drafts or other documents. What is the position with regard to the legal significance of such notes,

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The following statement has already been made in the "Fall-Gruen" in connection with the tentative preposal to manufacture an incident: a memorandum contains the deliberations, statements of fact and opinions of the author or of other authorities etc. It is not an order but the data on the basis of which the superior can decide whether he will issue an order and what order. As long as such a memorandum remains a memorandum, it is a purely internal affair without any significance in international law and can never be a violation of the laws and customs of war, as was explicitly laid down as the presupposition for punishment on Article 6b) of the Charter.

The same applies to the marginal comment which so often occurs in the files of the OKW: "Yes", "No" or "That is impossible" etc.

Admittedly, such memoranda or marginal comment may obtain legal significance. If a memorandum contains a proposal which is contrary to international law, and if it influences the superior in such a way that he

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issues an order with the same contents, this might possibly be regarded as participation in a violation of international law. If, however, no order is issued, or if an order is issued which is contrary to the proposal, then this proposal has remained without effect, a purely internal matter, and unpunishable under all circumstances.

Furthermore, a memorandum or marginal comment may be a guide to the writer's sentiments. It may be gathered from it that he is inclined favourably towards international law or that he takes no account whatsoever of considerations of international law. That may often be an important help in judging his character.

But we do not punish the sentiments. Murderous intentions throw a bad light on the subject, but, are not punishable. Caution must of course be exercised in the evaluation of such remarks. They are often thrown in thoughtlessly, without much deliberation, only intended for the reader in question etc.

If we take all this into account, several of the accusations which the prosecutors have raised against Jodl, are eliminated in advance:

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1.) His behaviour on the matter of the low-flying airmen (PS 731, PS 735). It had been proposed to leave low-flying airmen who attacked the civil population i a truly criminal manner, as it happened again and again, to the lynchlaw of the people. Jodl was opposed to this proposal, as it was bound to lead to the mass murder of all airmen who parachuted down. Jodl raised objections and more objections in the form of marginal comments. He succeeded in sabotaging the order thereb The Armed Forces never issued such an order. This should be placed to Jodl's credit, but it is apparent held against him that he did not use words of moral indignation in declining the proposal. Under the conditions existing at the time, such a cause would probably have had even the opposite effect. In any case there is no crime here.

2.) The Commissar Order (PS 884). On this horrifyin draft order which had been drawn up already prior to the outbreak of the Russian war.

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Jodl made the comment that it would provide reprisals against our soldiers, the order should preferably be drawn up in the form of a retaliatory measure, i.e. one should wait and see what action the commissars really took, and thentake counter measures perhaps. Again he is not given credit for the fact that he opposed it, but he is accused of how he opposed it. From a legal point of view that is meaningless. He did not even receive news regarding the success of his protests.

3.) Geneva Convention (D 606). In this case Jodl did not only submit a memorandum but also a statement in great detail to Hitler, as he wished under all circumstances to cross the latter's plan of renouncing the convention. There he mentions all the reasons against the renunciation, and reassures Hitler afterwards by saying that it is possible to circumvent certain claus even without a renunciation of the convention. This again is not an action contrary to international law, but shows at the most sentiments opposed to internatio law. More correctly: it appears to do so. In truth

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this was nothing but proven tactics for dissuading Hitler from his infamous plan. The renunciation did not take place. If one takes offence at the unethical argumentation, one over-looks the fact that Jodl, after five years experience, knew better than we do with what arguments it was possible to persuade his chief.

4.) Order regarding Leningrad (C 123).

By letter of the 7 October 1941, Jodl notified the Commander in Chief of the Army - and it's nothing but a notification -, that Hitler had repeated an already previously issued order to the effect that an offer of capitulation was not to be accepted from either Leningrad or Moscow. Such an offer was, however, never made, the order could not therefore have been carried out at all. The whole matter remained on paper, and if only for that reason, does not constitute a violation of international law. This also can at the most be regarded as a guide to the author's sentiments, but

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has no place on an indictment for the suspicion of a punishable action. The following should, however, be added in explanation of the matter: In this letter Jodl explained the indisputable situation of constraint which had caused Hitler to issue this order:

a) An offer of capitulation would only be simulated. Leningrad, in fact, was mined and would be defended to the last man as the Russian wireless had already announc The bad experiences as a result of the delayed action mines prepared according to a plan, in Kiev, Odessa and Charkov had taught the German Operational Staff what things they must beware of.

b) In addition there was the great danger of an epidemic which would exist also in case of a genuine capitulation Even if for that reason alone, German troops must not be allowed to enter the town. Acceptance of a capitulation was thus not practicable at all.

c) Added to that was the sheer impossibility of

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the German troops feeding a half-starved urban population of millions as well. The railway tracks had not as yet been altered to the width of the German tracks, even the supplies for our own troops caused much worry. And finally there was the military danger for the German operations, of which Field Marshal L e e b had complained to the defendant Keitel.

All this compelled steps to be taken to prevent the population of the towns from fleeing westwards and southwards through the German lines, but to make escape to the East possible for them, indeed, even to encourage it. Hence the directive to leave gaps in the front in the East

The fact that Hitler let it be understood how he intended to utilize the militarily technical situation of constraint within the framework of his Eastern plans lies outside the military considerations. It has nothing to do with the order itself. The only question is whether it was inevitable from a military point of view, and this it was in fact, for the above-mentioned reasons. Whet renewed notification of the order was given by Jodl or not could not alter the situation in any way.

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I shall discuss now individual war crimes of which Jodl has been accused

a) The Commando order

Two orders of the 18 October 1942 which were drawn up word for word by Hitler and signed by him, have played a special part in this trial: the so-called Commando Order to the troops (PS 498) and the explanatory order connected therewith to the commanders (PS 503).

According to their substance these orders lie outside Jodl's sphere. If Jodl had anything to do with the matter at all, then was for a special reason: these orders are executive directives to an order which had been issued by Hitler 11 days previously which had also been drawn up by him personally and attached to the Armed Forces Report of the 7 October 1942. Jodl composed this Armed Forces Report as usual, and therefore also the supplement regarding the previous history of the order which Hitler afterwards had added at the end of the Armed Forces Report. Hitler requested

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him therefore to work out drafts for the executive order: Jodl did not do so, nor did he submit a report which his staff had drawn up on their own initiative to Hitler. On the contrary, he had Hitler - with whom his relations were very strained at that time - informed that he was incapable of conforming to the request. Hitler then drew the two orders up himself.

Jodl is now accused of two things: He distributed the orders drawn up by Hitler through official channels, and he furnished the second, the explanatory order to the Commanders, with a special directive for secrecy.

The order arose from Hitler's excitement about two kinds of intensified warfare which made their appearance about the same time in the autumn of 1942. One was the fatal efficiency of excellently equipped sabotage detachments which landed by sea or were dropped from the air. The other one was a special running wild in the fighting methods of enemies who acted singly or in small groups.

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Jodl has described here how this running wild appea from the messages and photographs of the troops. Experience showed that these methods, which violated all military ethics, were met with especially amongst the sabotage detachments. Hitler wished to counteract these unsoldierly methods, and to stop the sabotage activity which was so dangerous for the German prosecuti of the war, but knew, of course, that sabotage cannot be objected to on grounds of international law if it is carried out by ordinary soldiers. Hitler's first order, the one contained in the Armed Forces report of the 7 October 1942, is therefore quite simply explained: no mercy will be shown to enemy soldiers who appear in sabotage detachments and behave "like bandits", i.e. who place themselves outside the military code by their method of fighting.

The executive directives should have defined the standard of unsoldierly conduct; Hitler's executive directive did not contain this definition; in the decisive points it is not definite, and this made it possible to apply the order in the sense of its undoubtedly justified fundamental idea, and not to apply it

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where there were even doubts as to whether one had been dealing with "bandits".

After all the reports which had been received about the enemy's behaviour, Jodl considered the basic tendency of Hitler's directive in the Armed Forces report of the 7 October 1942 understandable, and thought that the directives given by Hitler in t Commando Order of the 18 October 1942, which were in some points not clear, were in part admissible from the point of view of International Law and in part perhaps questionable from the same point of view . He says that he still knows no more exactly n than he did then whether and to what extent these directives were contrary to International Law. He says that one thing only was certain, namely that the indefinite wording of the order made it possible for the Commanders to apply the order only against people who had simply placed themselves outside the bounds of soldierly behaviour.

Jodl hoped that this method would be applied an as far as he could - he promoted it, as is proved by German evidence taken. He used all his powers to help ensur that the practical application of the Commando order was restricted to what was undoubtedly admissible.

trans-
cript
p.5773
Kessel-
ring's
evidence
p.10804

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He took steps to ensure, further, that the order was not applied in large areas, i.e. in the greater part of Italy, as soon as it was at all possible to wrest a local limitation from Hitler (PS 551).

The directive for secrecy is interpreted as a sign of Jodl's consciousness of guilt. But this secrecy had cogent reasons of a different nature. The enemy had to be prevented, as far as possible, from learning what serious damage their sabotage detachments which were operating in a bandit-like manner were causing. Hence the special directive for secrecy only in the order PS 503, which gives information about the damage, while the main order was known to the whole world through the Armed Forces Report. There was actually also a second reason for Jodl's imposition of special secrecy on the explanatory order. He did not wish to see the final decree, according to which captured Commando personnel were to be shot after interrogation, circulated. It revolted him as a human being to exclude unsoldierly fighters from the sphere of the Geneva Convention, whether such a course was admissible or otherwise according to international law.

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He hoped, and was justified in hoping, that the commanders would find ways of preventing inhumanities in individual cases by means of a healthy interpretation. And unauthorized persons were not to have knowledge of the decree.

The fundamental idea, which it was not indeed necessary to exceed in practice, conformed to international law which is only intended to protect men who are fighting as soldiers. This is, after all, the tendency of all the articles of war, which presuppose a chivalrous battle. Something had indeed to be done to turn the use of such wild methods into a hazardous operation for the enemy. Nothing could be said against sabotage detachments who fought in a soldiery way. The enemy had only to desist from those methods which were in radical contradiction to international law.

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The following must also be stressed: the transmission of this order does not prove responsibility for its contents. This is not like other cases where Jodl advised, or drew up the order - on the contrary: he refused to draw it up. He merely distributed it, as instructed, through the ordinary official channels. He is guiltless; however, not because-, or better, not only because- he was ordered to pass it on, but because he had no right to interfere with the order which was to be passed on. It was outside his jurisdiction, outside his rights, to examine it. His activity was purely technical, independent of the contents of the document. In theory he was not even obliged to read it. Let us assume that, after drawing up the order, Hitler told some lieutenant to telephone it to the Commander-in-Chief. Would it then have been the lieutenants right and duty also to examine the contents of the document with regard to its legal admissibility and to announce afterwards: "I will not do this", or "I shall have to consult the Hague convention for Land Warfare first to see "if I am allowed to do it"? The most grotesque consequences would ensue! And in this case the Colonel General is also nothing but a messenger who

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passes on what has been handed to him. Jodl's answer to my question as to what would have happened if he had refused to pass it on, is characteristic of the military interpretation of the situation: "In that case I would have been removed immediately - and rightly so!"

b) Partisan warfare.

As far as partisan warfare is concerned, reproaches could be levelled against Jodl only in two cases:

1.) If he had permitted the warfare to take place in a disorderly and "chaotic" manner, as one witness has asserted, or

2.) if he had issued battle directions, but if these had been contrary to international law.

But neither of the two is the case; Jodl was not personally responsible for this matter, but he had to take some interest in the partisan activity when it reached an extent which was beginning to interfere with the military operations. He issued a directive in 1942 which was replaced by a second one in 1944. It is therefore out of the question that no rules existed for the combatting of partisans.

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Nor can Jodl be reproached on the second point. Although Hitler wished to have a type of warfare waged against these dangerous opponents which had no consideration for ethics and international law, Jodl - without his knowledge - issued a pamphlet about the combatting of partisans which cannot be attacked legally. He went so far as to have partisans in civilian clothing treated as prisoners of war, and to permit the burning down of villages to be carried out only on the orders of a divisional commander; this was intended to, and could prevent violations of Article 50 of the Hague Convention for Land Warfare (RF 665, Doc. Book 11, Jo 44).

Jodl cannot be reproached, however, if the combatting of partisans nevertheless degenerated badly. It is not a matter for the Chief of the Operational Staff of the Armed Forces to supervise the observance of his directions in four theatres of war.

c) Burning down of houses in Norway (PS 754)

The prosecution have accused Jodl during cross-examination of having ordered the destruction of Norwegian villages. This accusation refers to the teleprint of 28-10-1944 to the High Command of the 20th Mountain Army.

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The prosecution have a false idea of the role which fell to Jodl's lot here.

The military position was then as follows: the Germans were retreating to the not yet completed Lyngen line. And there was a danger that the Red Army would continue to follow up during the winter and would thus destroy the much weaker German units, if, whilst advancing along the Reich Road 50, the only one that could be used at this time of year, they found the homes and the population with their local knowledge available. Without these billets and the support from the populatio the Russian advance was impossible. The evacuation of the population and the destruction of the houses would exorcise the danger and, over and above this, it would make partisan warfare against the German troops impossible. But the evacuation of the population was also necessary in the interests of the population itself.

In this position, Hitler issued, not on the advice of the soldiers but on that of the Reich Commissar for the occupied Norwegian territories, the decree which Jodl

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reported, by order, to the High Command of the 20th Mountain Army through the proper channels with all Hitler's military and ethical considerations. One can really hear Hitler's radical way of speaking.

Jodl, who knew, as a result of a telephone conversation with the staff of General Rendulic, that the mountain troops did not need such a far-reaching order militarily and therefore did not want it, was against this order and - when he could not prevent it - sought for a solution which in practice led to the correct result. He wanted the order to be carried out by the troops only in as far as was absolutely essential militarily and in accordance with what was permissible under the Hague Convention for Land Warfare (Art. 23 g). He knew that his brother, who was in command in the North, thought exactly like him; he knew the soldierly spirit of the mountain troops in general and he knew in this particular case in advance that this order went too far for the troops. So that it should be understood correctly by everyone right from the start, in the introduction to the teleprint he not only explained clearly that it was a "Fuehrerorder" - the second paragraph expressly uses these words - but he let the soldiers know that

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the Fuehrer had issued this order on the suggestion of the Reich Commissar, and not on the suggestion of the military. Then they knew. And they acted accordingly. No militarily unjustified demolitions occurred. Thus among others, the 3 towns of Kirkenes, Hammerfest and Alta were not destroyed. According to the literal application of the order, they had to be destroyed.

d.) Deportation of the Jews from Denmark (UK 56)

The prosecution wants to make Jodl responsible for the deportation of the Jews from Denmark. The prosecution bases this accusation on a teleprint which Jodl sent "By order" (I.A.) to the Commander of the German troops in Denmark. It is particularly difficult to understand this accusation by the prosecution. For the different documents submitted by the prosecution unequivocally prove that the deportation of the Jews from Denmark was decided upon by Hitler on a suggestion from Dr.Best, therefore on a suggestion from the civil authorities and against the objections of the Commander of the German troops

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and that this task was assigned to the Reichsfuehrer SS. The OKW was concerned with the whole affair only because at that time the military state of emergency existed in Denmark, so that the Commander of the German troops, as the highest executive authority in the country, had to be informed by his superior authority of the action ordered by Hitler and assigned to Himmler, in order to prevent friction between the German authorities in Denmark.

On the 20 Sept 1943 Keitel and Jodl had received the first intimation of the discussions between Hitler, the Foreign Office and Himmler, in a teleprint from the German commander. Jodl had only one wish - to keep the Armed Forces out of this matter. His temperamental remark on General von Hanneken's teleprint of the 3 October 1943 (D 647): "Also a matter of complete indifference to us" (namely: whether the Reichsfuehrer SS publishes the figure of the Jews arrested or not) shows that

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only too well: this has nothing at all to do with ethical considerations, either positively or negatively.

The whole thing had nothing to do with the armed forces. But difficulties could arise as a result of Himmler's action, as the armed forces were after all responsible for quiet and order in Denmark. The armed forces could not alter the decision taken by Hitler in this police matter, and could not have altered it even if they had been competent for this question.

Jodl simply informed the Commander, by the teleprint UK 56, of the decision Hitler had taken in the field of the police. And the Reichsfuehrer SS, the Foreign Office and the Commander in Chief of the Reserve Army were simultaneously informed by Jodl that he had let the Commander in Denmark know. Now there was a clear line, and friction between German offices was excluded. And the OKW had only to see to this.

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One cannot say that the information which Jodl gave made the execution of the order which Hitler had decided on apart from the Wehrmacht easier. It is clear to anyone who knows even a little about Hitler's position of power that friction between German offices would in no way have prevented the thing being carried out, but would at most only have delayed it, and would certainly not have made it pleasanter for the persons affected.

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IV.

Your honours!

It is an old saying of criminal law, a saying which I always find cited in foreign decisions too, that: "actus non facit reum nisi mens sit rea". Two things go to make a crime: the "actus", the objective side of the crime, the deed. And the "mens rea", the subjective side, the guilt.

The prosecution has fallen into a remarkable contradiction there: in some cases it stresses the "mens rea" and fails to see that the criminal "actus" is lacking: I have shown this in the case of the above-mentioned marginal comments, which do not represent any illegal actions, but at most could allow one to infer an illegal frame of mind. In other cases the prosecution looks only at the "actus", but does not ask whether a "mens rea" is also present . This second mistake is more dangerous, as here the outside of the crime is visible to everyone and it is often only a delicate psychological examination that

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comes to the conclusion that there is no "mens rea" which corresponds to the "actus". We will come to speak of this further on.

As regard the action, what is meant is behaviour declared criminal by the Charter. This behaviour can consist of positive action or of omission. If a father sees his child drowning while bathing and does nothing to save it although he could have done, we declare him guilty either of murder or of killing by negligence, according to the degree of his guilt. This commission of a crime by omission is important in this trial too. For the prosecution repeatedly stresses that Jodl was present at this or that meeting, at this or that speech. On one single page of the Anglo-American trial brief the sentence "Jodl was present at...." occurs 6 times. What does this mean legally? Being present at and listening to things can be of great importance for the evaluation of a later deed, for the doer can not excuse himself by saying "I didn't know" if he participated in the discussion of a plan. But mere presence does not in itself make one co-guilty. According to British law, even presence actually

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when a crime is committed makes one co-guilty only if encouragement is added. The same applies in German law. But where such does not come into the question, to lay stress on a person's presence when a criminal intention was discussed can only be a reproach that he knew about and tolerated it.

We often hear this reproach of having tolerated crimes now. Not only in this court. The whole German people are reproached with having tolerated a criminal regime and the annihilation of millions of Jews. Undoubtedly a crime can also be committed by tolerating things. But to make it a serious criminal indictment, e.g. one for intentional killing, two prerequisites must be fulfilled: 1.) the subjective side he must have known that the victim would meet his death if he did not intervene. 2.) He must have been in duty bound, and able, to prevent this death.

As far as Jodl is concerned, the following applies: what an officer or official is legally bound to do or prevent depends on the

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regulations governing competence, and we know how strictly Hitler insisted on their being adhered to, how sharply he managed to divide up the political and military leadership and the military and the SS in their spheres of tasks. This was indeed the reason why Jodl took every opportunity to oppose the plans for extending the SS, for one thing was clear: once something had become the sphere of the SS, the armed forces had lost the right to have any say in it. It does not therefore mean much, for instance, that Jodl was present at a discussion between Hitler and Dr. Best, at which one of the things discussed was terrorism in Denmark and the way to fight it (RF 90). The mention of so-called "counter-murders", if such were really discussed, was not heard by Jodl (he was not present at parts of the session). His presence at this session does not mean much if only because the whole matter concerned occupied territory and did did not concern the chief of the Operational Staff of the armed forces, who was brought into this meeting because of other things which where discussed at it. So even if Jodl had

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heard more drastic things/at that time than he actually did, any interference would have been out of the question and would have been rejected at once.

The reproach of having tolerated things also assumes that the possibility existed of preventing the crime. In the case of Jodl, only orders by the Fuehrer come into the question primarily; these orders he should - as people say - have prevented. But enough has already been said here about how things stood with regard to influence on Hitler's decisions. As long as his decision had not yet been made, g arguments could, under favourable circumstances, still impress him; but once his decision was made, it was irrever- sible. Any contrary opinion is simply based on ignorance of t facts. In course of time Jodl did actually develop other methods for influencing decisions of the Fuehrer, or at least for influencing their practical effects. He used delaying tactics; either he waited so as to let the matter be forgotten if possible,

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or else he made difficulties and raised objections, the type of counter-arguments having actually to be adapted to Hitler's way of thinking (Order regarding Commissars); or he sent for opinions from various departments in order to gain time (low-flying airmen); if the order had to be published, he often inserted into it on whose application the order had been issued, in order to show the Commanders in Chief that he did not identify himself with this matter. (Norwegian villages). Or he tried to influence the pratical application by not objecting to behaviour contrary to the order (Commando order, etc). But if one thinks that he could simply have refused to draft an unethical order, one has only to look at the Commando order, where this method had exactly the opposite effect to what was intended.

I now come to the second part of the Latin saying I quoted: The deed in itself is no crime, "nisi sit mens rea".

This is the last point in my statement and is at the same time the most difficult and the most important in a modern criminal trial.

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"No guilt, no punishment": this principle has been accepted in all civilised states since the Renaissance, even though different views as to the nature of guilt may exist in some places.

Allow me first to make a short comparison between the Anglo-American legal view and that of the Continent, e.g. of Germany. It is important when judging some cases.

I have already had to touch on an important point of the question of guilt when discussing the aggressive wars. If one wishes to make Jodl, the General Staff Officer, responsible for waging these wars at all, it is at any rate of decisive importance how he viewed the whole state of affairs. If he believed, on the basis of the reports he received, that facts existed which - if they were true - justified the waging of war, Jodl can not be reproached with having knowingly waged a wrongful war. This applies even if his assumption rested on mistakes. Such mistakes exclude design. In a decision Regina v. Tolson it is stated: "at common law a reasonable belief in the existence of circumstances

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which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence" (Kenny, Selection of cases illustrative of English criminal law, p 15). In another decision Regina v. Prince it is stated: It seems to me to follow that the maxim as to "mens rea" applies whenever the facts which are present to the prisoner's mind, and which he has reasonable ground to believe, and does believe to be the facts, would, if true make his acts no criminal offence at all" (Kenny, p 22). In a third case, Commonwealth v. Pressby, a good example is given: a sentry shoots at his commanding officer who is approaching him, in the belief that he is an enemy (Kenny, p 14). This last example is closely related to the wars of aggression which are to be judged here.

As a rule, ignorance of criminal law is no excuse under British law.

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However, one finds the noteworthy principle: "If, however, there is a doubt as to a question of law, a person cannot be convicted and subjected to imprisonment if he has merely acted on a mistaken view as to the law". Naturally a mistake about preliminary questions in civil law can also exclude criminal intention: " If a person takes what he believes to be his own, it is impossible to say that he is guilty of felony" (Principle and practice of the Criminal Law, by Seymour F. Harris, London 1943, p 26). This rule could also be significant in our field too for mistakes regarding the regulations of International Law.

Yet in this doctrine of mistakes I see a certain difference from German law. In German law any mistake, even if resulting from negligence, excludes intention. In British law this seems to apply only to "reasonable" mistakes "unaccompanied by negligence". If that sentry had shot too soon and without sufficient investigation, he would, under German Law

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indisputably only have to be sentenced for killing by negligence. In England and America, if I understand it rightly, this careless mistake would not be taken into consideration at all, and this soldier would have to expect a sentence fo intentional killing. But this difference in the conceptions of law should not play any part in our case. For one can can hardly reproach Jodl with having come to his conception of the situation on the basis of a hurried and careless examination of his reports.

The two laws differ in yet another point: I do indeed read in an English decision that intention and deed must coincide in order do constitute a crime, but we take a preciser view of this coincidence. According to German law, a person can be punished for intentional killing, only if, h foresaw, the fatal results and wished them. On the other han in the decision already quoted in Regina v. Prince, it is stated: "If a man strikes with a dangerous weapon, with intent to do grievous bodily harm, and kills, the result makes the crime murder. The prisoner has run the risk".

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According to German law, this man could be punished only for aggravated bodily injury, never for intentional killing (para 226 of the German criminal code.) That the "result", which may rest on chance, should turn the act into murder - is rejected by us as unjust.

Lastly, in a third point which is of importance here, the views again agree. Every serious crime must be deliberate though, for deliberateness, one need not have the consciousness of doing something criminal, but one must be aware that it is not right to act in this manner. To constitute a criminal act there must, as a general rule, be a criminal intent. The general doctrine is stated in Hales Pleas of the Crown, that "where there is no will to committ an offence, there can be no transgression" (Commonwealth v. Pressby, Kenny, p 14).

In German law, it has been argued for a long time whether the perpetrator must know that he is acting in direct contravention of the law , or whether it is sufficient for him to know that he is in general committing something contrary to his duty. And the prevailing opinion

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which has also been taken over by the plan of our German Criminal Code, states: the perpetrator must be conscious "of acting against a law, or of acting wrongly in some other way (in a natural sense)." I was greatly interested to find the same idea, expressed in almost the same words, in the decision of Green v. Tolson (Kenny p 15/16): "it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may coexist with respect to some deed". Thus according to British law. knowledge of not being allowed to act thus is one of the constitutents of intent: "There is a presumption that "mens rea! an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence." (Sherras v. de Rutze Kenny, p 34). This decision quotes some exceptions to this principle, which do not interest us here, however; they concern Bigamy and

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seduction, where positive definitions of the statute intervene, as well as certain offences against public order etc.

Our question now is: Was Jodl aware of wrongdoing during the preparation and passing on of the various plans and orders of which he is accused to-day? According to my innermost conviction: No.

The only evidence of it, which the prosecution has produced is the question: why if he had a clear conscience was he in some cases so intent on observing strict secrecy? There is an answer to this: in military questions there are the most manifold reasons for not allowing certain things to become known. This was so before the war and all the more so during the war, and even now, after the war, deep secrecy shrouds the atom bomb for example. This kind of observance of secrecy need not be connected with a guilty conscience. And if Jodl says he had arranged that one of the two Commando orders should - irrespective of other reasons, - be kept secret because of its repulsive final regulation,

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he did so, presumably, for the sake of the honour of the German Wehrmacht, and truly not because he thought that he himself was doing something wrong by passing on the order, which he had after all not drafted himself and for which, as he was convinced, he was not responsible.

This last fact must be stressed; it is of general importance. In all Jodl's military preparatory work, whether he was making plans for wars or drafts of decrees or memoranda, the point is not only whether he knew or suspected that this war or that decree were contrary to law, but it is decisive whether he knew that by his co-operation, by his actions he was doing something wrong. That Jodl did not have bad conscience clearly follows, it seems to me, from the fact that before his capture he had 3 weeks time in which to burn most of these documents, but did not do so, because he was quite convinced he had nothing to conceal.

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When drawing up this order, he was not conscious of wrong-doing. He could not be if only for two reasons: partly because he felt himself bound by the Fuehrer's orders, partly because - regardless of any concrete order - he was convinced that in his position as Chief of the Operational Staff of the Armed Forces he was in duty bound to act in this way.

Let us look into this more closely:
About the order and its legal meaning I will not speak any further. One point, however, appears to me to be in need of elucidation: Mr. Jackson quoted para 47 of the German Military Penal Code to prove that, according to German law, an order by a superior officer does not excuse the subordinate.

Incidentally it is remarkable, that, in the case of the conspiracy, British-American law is used, whereas, - in the case of this order, German law is drawn on - in each case according to which ever is the less favourable to the defendant. I do not know, however, whether Mr. Jackson would have referred to para 47 of the Military Penal Code, had he known how it was interpreted by the Supreme Militar

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Courts and what was therefore the real legal position in Germany.

It is first of all necessary to establish that at the beginning of para 47 there stands the principle: "Should, by the execution of an order on official business a criminal law be infringet, the superior officer issuing the order is alone responsible." And now comes the exception which practic has cut down to the absolute minimum for the sake of maintaining military discipline. It is based on the point of view that a subordinate is subject to punishment as a participant only of the order was not binding on him (because, for instance, owing to its nature it did not come within the framework of Wehrmacht tasks (RGST, 64, 67, 58, 110) and if the subordinate was aware that the action ordered had a crime or an offence as its aim; the offence must thus be directly intended by the person issuing the order and the subordinate must be certain of this (Reich Military Law Code 19, 195). That he could and should have realised this is not sufficient (Reich Military Court 13, 184). And, even if the subordinat is responsible, in case of slight guilt punishment may be waived. (final sentence of para 47).

The whole definition is very much contested, but one can see how the courts

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have limited its validity in order to cover the obedient soldier as much as possible. Reich Military Court [illegible] 13, 184; 19, 195) (Schoenke, Military Law Code, 6th edition 1944, p 100 seq.) Actually, a punishment of cases in this kind occurred very rarely. Jodl does not remember a single case in his 30 years of service.

I must insert something here, since a few days ago Mr. Jackson presented a document subsequently, which concerns this problem (PS 3881). These are statements which Dr. Freisler, made as President of the People's Court, during the trial of those who took part in the attempt of the 20 July 1944, Freisler was always considered in Germany as a caricature of a judge, his unworthy shouts in that murder trial were produced here before us by the prosecutors a few months ago in a sound film. This legal expert (so far as the sense of his remarks, torn from the general context, is recognisable) meant: When an office ordered a subordinate to give assistance in murdering Hitler, this order did not justify the one who obeyed.
In order to establist this, Freisler's "authority" was not required in any case. If ever a military order was issued which went outside the competence of the Wehrmacht and was therefore not binding, and did not therefore serve as an excuse, it was the order to murder the head of this very Wehrmacht. But how an order by some officer or other to murder the head of the State can be compared with the order of the Head of the State to commit an act contrary to international law, is incomprehensible.

I am not, however, dwelling further on this idea. No understanding of Jodl's position can be achieved and no correct judgement of his actions formed, if we do not look at the two men, who faced each other here.

The prosecution have made it easy for themselves. Were Hitler still alive, he, as the head of the Major War Criminals, would sit in the first place on the defendant's bench and would be considered as the base and source of all terrible events. Now that he is dead, his person is minimised when judging the oth defendants

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and their conduct treated almost as if he had never existed at all. This man of force, this infernal power, as Jodl called him, cannot be passed over as a negligeable quantity when the question is to do justice to the commissions and omissions of his immediate entourage. During these months, I have again and again had to think of the connection between genius, madness and crime which was once shown by the perspicacious Cesare Lombroso. In history it is success that has the last word on the worth and worthlessness of men. That is why the judgment of history on Hitler will perhaps be a crushing one. But one must not forget his beginnings: when Germany's position at about the end of 1932 is compared with that at the end of 1938, one is not surprised at the incomparable prestige which he had at the very time when Jodl came into close contact with him.

Jodl now stood opposite this man. Jodl, an honest soldier, extraordinarily gifted, but never striving for anything else but to be a conscientious soldier, with a prosaically realistic mind, ill-disposed towards all diplomacy, all political machinations,

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grown up in accordance with the ideals of the German officer corps - bravery, faithfulness, obedience - trained according to the 100 years old tradition of the German General Staff, which knew only fulfilment of duty, selfless work and more work.

That this man, who was working at Adolf Hitler's side, was bound to come under his influence is self-evident. One must consider the time at which this took place. A relation of confidence could not grow out of it, of course, but Jodl was also not the man to submit without opposition. There were enough clashes and explosions. Jodl was regarded as the man who dared to oppose the Fuehrer more than anybody else. He could, as Kesselring reported, oppose him with a sharpness which at times reached the limits of what is militarily permissible.

For this very reason I do not believe that it is order and obedience which can make us appreciate fully Jodl's behaviour during these years.

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It was rather the much more comprehensive thought of the fulfilment of duty: complete devotion to what had been allotted to him as his task at a critical time. One should realise the situation in which Jodl found himself. His country's battle for existence, the demands of the war which was continually becoming more horrible, and at the same time the view of his Supreme Commander-in-Chief which deviated from all tradition - about what was permissible and not permissible in a war. It becomes quite clear that Jodl was bound to come into conflicts, into conflicts with Hitler and into conflicts with himself.

Permit me to make a comparison: You, Your Honours, feel yourselves bound by the Charter of this Tribunal, as you have already informed us. Perhaps some of you have been assailed by doubts as to whether all the conditions of this Charter conform to the international law at present valid and to the generally recognized legal principles. But you have rejected such doubts, since you, as judges, consider yourselves bound by the rules which your four governments have agreed upon.

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Jodl in his capacity as a General Staff officer, may have felt himself bound, in a similar way, to assist in the orders of his supreme Commander - in-Chief, even if doubts regarding their admissibility in international law may have assailed him here and there. But he considered himself bound by his office to draw up plans for war without examining whether and under what conditions they were carried out; he had to formulate, and issue thousands of orders, even if he disagreed on some points. Where neither remonstrances nor delaying tactics had any effect, he had to submit. As a General Staff Officer he had a purely assistant function. That he might be doing wrong while fulfilling this function according to the best of his knowledge and conscience never even occurred to him .

It is said now: Jodl should not have taken any part in this or that affair under any circumstances. What should he have done?

If one reproaches somebody with having acted in a certain way, one must be in a position to state what action would have been right in that situation.

It is declared that he should have resigned.

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This would of course be an easy way out. It could be taken in peace time, but in war time it was different.

Jodl tried repeatedly to get out of the OKW and to get posted to the front. Applications for resignation were altogether futile unless they were desired by the Fuehrer , as in the case of v. Brauchitsch and v. Leeb. In war time he strictly forbade his generals to apply to resign. This was desertion, he said; the private in the front line could not resign either when he found things were unpleasant. The general also had to remain at the post where he was put. In 1944 this order was repeated in writing with all possible emphasis and given reasons. If a general wanted to quit for reasons of conscience, he was to know that the Fuehrer himself bore full and sole responsibility for his orders and that the generals' sole duty was to be responsible for their strict execution. Resignations on such grounds were not soldierlike and criminal.

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So Jodl could not resign. Should he perhaps have faked an illness? This also is desertion and, in wartime, a crime punishable by death. Is it possible seriously to expect an officer brought up in the good old traditions to betray his country in time of need like a coward - his country , to which he had devoted all his life? The effect of which would be that he would no longer be able to look any new recruit in the face?

There was therefore only the third solution: Murder and revolution. In peace time this would at the same time have meant civil war, in wartime the immediate collapse of the front and the end of the Reich. Was he then supposed to cry: "Fiat justia pereat patria?"

Really the prosecution seems to be of the opinion that such an attitude was to be demanded from the defendants. An astonishing idea! Whether murder and treason can ever be justified ethically had better be left to moralists and theologians to dispute over. For lawyers, at any rate, something like that can not be a subject for discussion.

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To be obliged on pain of punishment, to murder the head of the State? And, what is more, as a soldier? And in war-time ? People who commit such crimes have always been punished, but to punish them for not doing so would be something new.

Naturally there are limits to legal obligations for the lawyer too, but in dilemmas which offer only this kind of solution, the old saying :/Ultra posse nemo obligatur, applies.

Jodl was no rebel. His conscience told him: The Fatherland is in need, everybody at his post! Jodl's place was at the head of the operational staff of the armed forces. He did not get this post voluntarily, he did not keep it voluntarily. It was a hard duty. He fulfilled the task which this post imposed on him, according to the best of his ability and conscience - unto the bitter end.

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Your Honours!

Allow me in conclusion to recall a personal reminiscence, which throws more light on Jodl's personality.

I made his acquaintance about 20 years ago in the house of his uncle, the philosopher Friedrich Jodl, in Vienna. There I had a conversation with him on the education for a career as an officer. What the young captain said about it was of such moral earnestness, and so far from anything that could be called militarism that I have always retained it in my memory. I had no more contact with him of any sort until last autumn, when I received the surprising summons to defend him here. My first thought was : "This gallant soldier must be helped." But I doubted whether to undertake this, since I am not a professional attorney. Still, when I met him in the court building for the first time, he said something to me which scattered all doubts:"Rest assured, professor", he said, "if I felt a spark of guilt in me, I would not chose you as my defence counsel."

Your honours, I believe that a gentleman, and not a criminal speaks thus.

I ask that the colonel general Alfred Jodl be acquitted.